LEE CHONG LIM

v.

STANDARD CHARTERED BANK MALAYSIA BHD

HIGH COURT MALAYA, JOHOR BAHRU
KANG HWEE GEE J
[CIVIL SUIT NO: 22-198-2002]
17 OCTOBER 2003

CIVIL PROCEDURE: *Specific Performance - Contract - Contract to lend money - Whether fall within classes of agreement where specific performance allowed - Rules of High Court 1980, O. 81*

CIVIL PROCEDURE: *Rules of court - Non-compliance - Citation of wrong order - Whether fatal - Rules of High Court 1980, O. 1A*

CONTRACT LAW: *Agreement to grant credit facilities - Whether loan can be withdrawn after offer was made and accepted - Whether loan is "on demand"*

The plaintiff applied for a housing loan from the defendant. He was offered a loan to be secured by a charge on the land for a specified period of 240 months, *vide* a letter of offer dated 27 June 2001. The plaintiff accepted the offer and entered into a Facilities Agreement with the defendant and thereafter, executed a memorandum of charge. Pursuant to the agreement, the defendant redeemed the land from Southern Bank. The Discharge of Charge, Memorandum of Transfer and Memorandum of Charge were presented and effected at the Land Registry. The defendant then decided to withdraw the loan facilities and issued a letter of demand to the plaintiff. The plaintiff applied for summary judgment under O. 81 Rules of the High Court 1980 (RHC) for specific performance. The issues are (i) whether the agreement by which the plaintiff is seeking to enforce fall under the class of agreements described in O. 81 r. 1(1)(a) RHC; (ii) whether the defendant can withdraw the loan facility under section 4.04 of the Facilities Agreement; (iii) whether the defendant can demand repayment of the loan at any time under section 7.01 of the Facilities Agreement; (iv) whether damages an adequate remedy.

Held (order accordingly in terms of plaintiff's application):

[1] An incorrect citation of the orders of the Rules of High Court (RHC) is not necessary fatal, where the substance of the application is clear and comprehensible to the defendant. The court looks to the substance not the form. (O. 1A RHC). (p 457 a-b)

[2] It is clear that both section 4.04 and section 7.01(a) of the facilities agreement do not provide the defendant with the right to abdicate its obligation to provide loan. Having committed itself to provide the plaintiff the term loan, the defendant is dutybound to complete its obligation to disburse the loan under the agreement, before it is competent to invoke its right under section 4.04 and section 7.01. (p 458 b)

[3] Even if, assuming the two clauses can be construed to be operative before the loan was fully disbursed, they are clearly repugnant to the terms of the letter of offer, as pursuant to the letter of offer, the loan is repayable over a period of 240 months with a fixed monthly repayment sum and not a loan repayable "on demand". Where such a repugnancy arose in an agreement for a loan of such nature, the Supreme Court in *Mae Perkayuan* had applied the *conta preferentum* rule in favour of the borrower. (p 458 d-f)

[4] In the instant case, damages is clearly not adequate to satisfy the demand of justice of the plaintiff. (p 464 c)

[Order in terms.]

Case(s) referred to:

Bagot's Executor and Trustee Co Ltd v. Coulls' [1967] 40 ALJR 471 ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors [1992] 1 CLJ 367; [1992] 1 CLJ (Rep) 402 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Beswick v. Beswick [1967] 2 All ER 1197 ***(refd)***

Eushun Properties Sdn Bhd v. MBf Finance Bhd [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 SC ***(refd)***

Hart v. Hart [1881] 18 Ch D 670 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

The South African Territories Ltd v. Wallington [1898] AC 309 ***(refd)***

Wight v. Haberdan Pty Ltd [1984] 2 NSWLR 280 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 1A, O. 14, O. 81 r. 1(1)(a), (b), (c)
Specific Relief Act 1950, ss. 11(1)(c), 20(1)(a)

Other source(s) referred to:
Paget's Law of Banking, 10th edn, p 183

For the plaintiff/appellant - Vijaya Gopal; M/s Vijaya Gopal & Assoc
For the defendant/respondent - Alvin Julian; M/s Paul Chong & Nathan

Reported by Izzaty Izzuddin

JUDGMENT

Kang Hwee Gee J:
By this application the plaintiff seeks a summary judgment purportedly under O. 81 of the Rules of the High Court 1980, for the specific performance of a contract entered into with the defendant *vide* a letter of offer read with a Facilities Agreement by which the defendant bank had agreed to provide the plaintiff a loan for the purchase of a piece of land.

The plaintiff had purchased the land Lot No. PTD12029 Mukim of Pontian together with a building erected thereon from a company called Goodview Property Sdn. Bhd., at the agreed sum of RM320,000.

Upon signing the sales and purchase agreement, he paid the vendor a deposit and down payment of RM32,000 leaving a balance of RM288,000 to be paid at a later date. The plaintiff then applied for a housing loan from the defendant, Standard Chartered. He was offered a loan to be secured by a legal charge on the land for a specified period of 240 months in a letter of offer which read as follows:

Standard Chartered
Standard Chartered Bank Malaysia Berhad
(Reg No. 115793P)

Credit Centre, Consumer Banking
Malaysia
P.O. Box 13554, 50814 Kuala Lumpur
Malaysia

Telephone (603) 7725 2020
Facsimile (603) 7720 4722

Our Ref: 316628
LEE CHONG LIM

27 June 2001

MR LEE CHONG LIM

2306 MAILBOX MENARA LANDMARK NO 12
JLN NGEE HENG
JOHORE MALAYSIA 80000

MORTGAGE OF Terrace (Single Storey) at 255 JLN SAUJANA 11 TMN SAUJANA JLN PARIT SE JOHOR JOHORE MALAYSIA 82000 HS(D) 7639 PTD 12029 MK PONTIAN DIST PONTIAN ["the Property"]

Thank you for choosing Standard Chartered Bank Malaysia Berhad. We are pleased to offer you banking facilities on the following terms and conditions.

Banking facilities for purchase of the Property:

1. Housing Loan

Loan Amount	**RM275,715.52** Inclusive of MRTA premium of RM3715.52	
Loan Tenor	240 Months (20 Years)	
Margin of Financing	86.16% of Purchase Price.	
Interest Rate	Year 1	Fixed Rate of 3.88%
	Year 2	Our Bank's Lending Rate (6.80%)
	Subsequent Years	0.60% per annum above our Bank's Lending rate (6.8%)
Default Interest Rate	Interest Rate levied is 1% above the Prescribed Rate or such other rate as we may at any time or from time to time stipulate on the instalment and or interest or any other sum at that time due, or in arrears calculated from the date of such default until the payment of the amount thereof together with a fixed administrative charge we may stipulate	

Repayment	Year 1 RM1,653.40 per month **Year 2 RM2,084.35 per month**	*a*
	Subsequent Years RM2,175.56 per month	
	This amount is subject to change based on prevailing Base Lending Rate.	*b*
Account No.	**873120157142**	
2. Security	A Facilities Agreement signed and stamped for RM275,715.52 A signed and registered open all monies 1st/3rd party First charge/Deed of Assignment over all rights and interests in respect of "the Property".	*c*
3. Insurance	1) You are required to take out insurance for the property against fire and extraneous perils with an insurance company approved by us for such amount as we may require.	*d*
	2) You irrevocably and exclusively authorise the Bank to arrange such insurance on your behalf for the tenure of the loan.	*e*
4. Special Conditions	Processing Fee is waived.	
	Facility Agreement and Registered Open All Monies 1st Party 1st Charge.	*f*
	Property to be registered in the name of the borrower.	
	Statutory Declaration on Owner Occupation or for conduct of own business.	*g*
	You are required to take out an MRTA policy with an insurance company approved by the Bank nominating us as beneficiary for the whole loan amount and the loan period from 1st drawndown date.	*h*
	MRTA for 5 years.	
		i

Fixed Interest Campaign at 3.88% for 1st year or from 1/7/2001 till 30/6/2002 commencing from 1st disbursement date, BLR + 0% for 2nd year and thereafter will be BLR + 0.60%.

A penalty cost of 2% is levied on the loan amount approved if the loan account is redeemed or discharged during the 1st 4 years.

Loans will be on fixed tenure basis.

We thank you for giving us the opportunity to be of service to you.

Yours sincerely,

Signed

...
JAHZALINA MD. JONED
MORTGAGE SALES SUPPORT OFFICER

The plaintiff accepted the offer and in consequence thereof entered into a Facilities Agreement and executed a Memorandum of Charge of the land purchased in favour of the defendant. The land had been charged to another financial institution, Southern Finance and pursuant to its obligation under the agreement the defendant redeemed the property by paying Southern Finance the redemption sum of RM160,000 and obtained from the latter a duly signed Discharge of Charge together with the original title deed. The Discharge of Charge, the Memorandum of Transfer, and the Memorandum of Charge were presented and effected at the Land Registry, Johor Bahru to create a charge in favour of the defendant as security for the loan.

The defendant then had a change of mind. It decided to withdraw the loan facilities granted to the plaintiff. Its solicitor then issued a notice to the plaintiff as follows:

PAUL CHONG & NATHAN

Advocates & Solicitors/Peguambela & Peguamcara
Trade Mark Agents/Ejen Cap Dagangan

PLEASE QUOTE OUR REFERENCE WHEN REPLYING

Our Ref: PCN/SCB/28042/2001/RY

Your Ref:

18TH FLOOR, WISMA BUMI RAYA
NO. 10, JALAN RAJA LAUT
50350 KUALA LUMPUR

TEL NO: 603-26911511
FAX NO: 603-26929105
EMAIL: pcan(8).tm.net.mv

20th November 2001

LEE CHONG LIM
Unit 23.06, Mail Box 236
Menara Landmark
No. 12, Jalan Ngee Heng
80000 Johor Bahru
Johor Darul Takzim **REGISTERED/ORDINARY POST**

and/or

LEE CHONG LIM
No. 224, Jalan Inang 4
Taman Iskandar
80150 Johor Bahru
Johor Darul Takzim **REGISTERED/ORDINARY POST**

and/or

LEE CHONG LIM
No. 225, Jalan Saujana 11
Taman Saujana
Jalan Parit Semerah
82000 Pontian
Johor Darul Takzim **REGISTERED/ORDINARY POST**

Dear Sir/Madam,

Re: 1) Type of Facility: Housing Loan

Account No	:	37268368
Amount	:	RM275,715.52

2) Type of Facility : Personal Loan-Clean
Account No : 37268295
Amount : RM16,000.00

We act for Standard Chartered Bank Malaysia Berhad of No. No. 2, Jalan Arnpang 50450 Kuala Lumpur.

2. We have been informed by our clients that pursuant to your application, our clients had agreed to grant to you the above captioned facility(ies); which as at to date the said Housing Loan has not been fully disbursed.

3. We have been further informed by our clients that pursuant to their investigations, they are led to believe that documents verifying your employment and income particulars given to our clients in support of your application were false and untrue.

4. In view of the aforesaid we have been instructed by our clients to inform you that they have decided to withdraw the Housing Loan and recall the Personal Loan granted to you. Our clients will cease to make any further disbursements under the said Housing Loan.

5. Further we have also been instructed by our clients to demand from you, which we hereby do, the following sums:

a) Type of Facility: Housing Loan (Account No: 37268368)

the sum of RM164,252.02 being the sum disbursed by our clients as at 4th November 2001 together with interest thereon at the rate of 3.88% per annum calculated on monthly rests from 14th October 2001 until date of full payment due and owing under the abovementioned account.

b) Type of Facility: Personal Loan-Clean (Account No: 37268295)

the sum of RM15,985.32 being the sum due and owing to our clients as at 4th November 2001 together with interest thereon at the rate of 7.40% per annum calculated on monthly rests from 3rd November 2001 until date of full payment due and owing under the abovementioned account.

6. TAKE NOTICE that you are to pay the said sums demanded for hereinbefore together with our cost of RM70.00 and together with service tax of 5% thereon for issuing this notice within FOURTEEN (14) DAYS from date hereof, failing which, we have our clients strict instructions to institute legal proceedings against you in which event you would be liable for costs expenses incurred therein.

7. Kindly also take notice that any payment(s) made to our clients or us as their solicitors which payment is less than the amount demanded for herein shall be received without prejudice to our clients' right to institute foreclosure/ legal proceedings to recover any outstanding balance and such rights shall be exercisable without further advice to you.

Yours faithfully,

Signed.

AJ/sue

The Grounds Upon Which This Application Is Opposed

It is to be noted from this letter that the reason for the withdrawal of the facility was the alleged falsity of the documents supplied to the defendant in support of his loan application. Despite the allegation, no such falsity was averred to in the defendant's affidavit to oppose this application. Instead, three grounds wholly unrelated to the allegation of such falsity were advanced in the opposing affidavit of its Pengurus, Pusat Pinjaman, Bahagian Perbankan Pengguna, Stephen Hong Ah Min.

First, it was contended that the agreement by which the plaintiff is seeking to enforce does not fall under the class of agreements specifically described in O. 81 r. 1(1)(a) of the RHC.

Second, that under section 4.04 of the Facilities Agreement the defendant is under no obligation to make or continue to make available any of the facilities to the plaintiff or to make or continue to make any advance to the borrower or to any person or party; and under section 7.01(a) the defendant has the absolute right and discretion to demand repayment of the term loan at any time.

Third, that even if there was a breach of agreement on the part of the defendant, the contract the parties had entered into being a contract to lend money, is not one where specific performance can be granted. All that the plaintiff would be entitled to (assuming a breach of contract was proved) was damages to be assessed. The defendant cannot be forced to perform a contract which it no longer wish to complete.

These will be addressed and considered in turn shortly.

The Suitability For An O. 14 Application

A plaintiff is entitled to judgment where it is plain that there is no arguable defence to his claim – for "the underlying philosophy in an O. 14 provision", as Hashim Yeop Sani SCJ said in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 "is to prevent the plaintiff clearly entitled to the money from being delayed his judgment."

An O. 14 procedure is not meant to shut out a defendant who has a viable defence. But a court considering an application for summary judgment is required to undertake a critical appreciation of the claim and not attempt a mere cursory assessment, as Mohd. Azmi SCJ said in *Bank Negara Malaysia v. Mohd. Ismail Ali Johor & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14:

Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand". (See *Cow v. Casey* [1949] AER 197; and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 AER 508 at 516).

The substantive issues in the instant case it is clear, involve only the determination on the facts as they stand undisputed:

(1) whether the defendant is entitled to rely on sections 4.04 and 7.01(a) of the Facilities Agreement to discontinue its obligation to provide the loan and demand the repayment of the sum that it had disbursed, and

(2) whether the defendant had committed a breach of agreement, and if so whether an order of specific performance is an appropriate remedy under the circumstances.

They are issues which merely require the application of law to the undisputed facts, and, in my view, can be resolved expeditiously by this application for summary judgment.

A Procedural Issue

First, I shall deal with the purely procedural point that the application does not come within the ambit of O. 81(1)(a), (b) and (c) to which counsel for the defendant has correctly submitted is concerned merely with specific performance "for the sale, purchase or exchange of property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;"

Rightly therefore, this application should have been made under the general provision of O. 14 which has a larger foot-print to include the grant of an order of specific performance of other contracts. But an incorrect citation of the orders of the RHC is not necessarily fatal, where the substance of the application is clear and comprehensible to the defendant – to seek by way of an application for summary judgment the specific performance of a contract. The court looks to the substance not the form. The rule is now made all that much clearer with the recent introduction of O. 1A of the RHC which provides that:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

The 1st Issue – Whether Defendant Can Discontinue The Loan

To fully appreciate the defendant's argument on this point, it would be necessary to set out verbatim both section 4.04 and section 7.01(a):

> Section 4.04 read as follows:
>
> Notwithstanding any other provisions in this Agreement to the contrary, it is hereby expressly agreed and declared that each Facility may be reviewed and or amended and or varied from time to time and at any time by the Bank irrespective or whether or not an Event of Default has occurred and nothing in these presents contained shall be deemed to impose on the Bank any obligation either at law or in equity to continue to make any Advance thereunder to the Borrower or to any person or party.
>
> Section 7.01 (a) read as follows:
>
> Without prejudice to Section 14.02, each of the Term Loan so far as not otherwise or discharged under the provisions of this Agreement shall be repaid by the borrower on demand by the Bank which demand may be made by the Bank at any time or from time to time at the Bank's sole and absolute discretion irrespective of whether an event of default has occurred or continuing and without any obligation to give any reasons therefore and until such demand is made, the borrower shall repay such term together with interest thereon at the relevant Prescribed Rate by the relevant installments timeously and on each of the relevant installment Payment Dates without notice from the Bank such that such Term Loan and all accrued interest thereon shall have been fully repaid to and settled with the Bank.

Section 4.04 speaks of the right of the defendant to review, amend or vary the loan from time to time and section 7.01(a) speaks of the right of the defendant to require the plaintiff to repay the loan on demand. Clearly, the right of the defendant to review, amend or vary, and to demand the repayment of the loan under the two provisions was meant to be operative only after the

defendant had performed its obligation, that is to say, only after the defendant had fully disbursed the loan – for common sense dictates that such acts could only be undertaken after the fact.

Both the provisions, it is clear, do not provide the defendant with the right to abdicate its obligation to provide the loan. Having committed itself to provide the plaintiff the term loan, the defendant was duty bound to complete its obligation to disburse the loan under the agreement, before it is competent to invoke its right under section 4.04 and section 7.01(a)

To interpret the two provisions as enabling the defendant to recall the loan at will even before it was fully disbursed would tantamount to conferring upon it a *carte-blanche* to break a concluded contract at will without having to incur any liability – an act wholly repugnant to the law of contract.

But even if the two clauses can be construed to be operative before the loan was fully disbursed, they were clearly repugnant to the term of the letter of offer under which the loan to be provided to the plaintiff was (as counsel for the plaintiff rightly submitted), a term loan repayable over a period of 240 months with a fixed repayment sum per month as stated in para. 1 of the letter of offer *(supra)* – as opposed to a loan repayable 'on demand' at any time at the discretion of the defendant. Where such a repugnancy arose in an agreement for a loan of such a nature, the Supreme Court in *Mae Perkayuan, supra*, had applied the *conta preferentum* rule in favour of the borrower. The court in recalling another Supreme Court case of *Eushun Properties Sdn Bhd v. MBF Finance Bhd* [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104, considered and approved a passage in the unreported judgment of Goff J in *Titford Property Co Ltd v. Cannon Street Acceptances 1975* as it appeared in *Paget's Law of Banking*, 10th edn at p. 183 as follows:

> It seems to me, where a bank allows an overdraft for a fixed time for a specific purpose – whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of the abortive expenditure ... (the bank) could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involve the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time, in my judgment, therefore, I must modify cl 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.

It is clear that the defendant's reliance on clauses 4.04 and s. 7.01(a) of the Facilities Agreement to claim that it has the absolute right to discontinue its obligation to provide the loan and to demand repayment of any advance that it had disbursed is plainly unsustainable.

The 2nd Issue – Whether Defendant Had Committed A Breach Of Contract

By signing on the letter of offer indicating his acceptance of the defendant's offer, a legally binding contract had been concluded between the parties (See *Bank Bumiputera Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Ors* [1992] 1 CLJ 367; [1992] 1 CLJ (Rep) 402) – subject only to the conditions subsequent that the plaintiff performed all the requisite matters mentioned therein including executing the Facilities Agreement. Once the Facilities Agreement had been duly executed, the parties were bound by the terms and conditions of that agreement.

It is elementary, requiring no further deliberation, that by refusing to make any further disbursement to the vendor to enable the plaintiff to complete the sale and demanding the repayment of the sums that had been disbursed, the defendant was in breach of contract to provide the loan to the plaintiff under the Facilities Agreement read with the letter of offer.

Having found that there was a breach of contract on the part of the defendant, what remains to be determined is whether an order of specific performance should be made. This is purely an exercise of judicial discretion based on settled and established principles of equity, the process of which I shall revert to shortly.

The 3rd Issue – Whether Specific Performance Should Be Ordered

Under the common law of England which we adopted a contract is treated essentially as a bargain with commercial elements the breach of which it is to be assumed can be compensated by damages. Hence a court will only lend its hand in equity to grant specific performance against an erring party where it is clear that the damages the other party would obtain in consequence of the breach would not provide him with an adequate remedy. The principle is cast into the two complementary provisions of the Specific Relief Act 1950 as follows:

Section 11 (1)(c) read:

> Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced:
>
> (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

Section 20(1) read:

> Contracts not specifically enforceable.
>
> (1) The following contracts cannot be specifically enforced:
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief;
>
> ILLUSTRATION
>
> A contracts to sell, and B contracts to buy, $10,000 in the four per cent loan of the City of Penang;
>
> A contracts to sell, and B contracts to buy, 40 pikuls of coffee at $30 per pikul;
>
> **In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of $10,000. and to honour A's drafts to that amount:**
>
> The above contracts cannot be specifically enforced, for in the first and second both A and B, and in the third A, would be reimbursed by compensation in money.

The decision of the House of Lords in *South African Territories*, *supra*, appears to draw a parallel with the third illustration of s. 20(1)(a) (bold), as a specis of contract to which specific performance cannot be ordered. But as with all illustrations, it is purely illustrative and certainly not an imperative that all contract to lend money or 'to open a credit' cannot be specifically enforced. As Kearney J in the *Wight* case *(infra)* said, it was not meant to place a 'physiological objection' to the grant of specific performance in all contracts to lend money. Whether or not the decree is issued would still have to be decided by the question of whether damages are an adequate remedy in each case.

The two provisions in the Act, in fact, allow counsel for the defendant the latitude to argue that a decree of specific performance is not available to compel the promisor in a contract to lend money (such as in the instant case) to carry out his promise. He relied on the House of Lords case of *The South African Territories Limited v. Wallington* [1898] AC 309 wherein at 312 the Earl of Halsbury LC said:

> ... The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do.

> With respect to the claim for specific performance, a long and uniform course of decision has prevented any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right ...

The sentiment was shared by the other members of the panel.

Per Lord Watson at 314:

> ... the only engagement made by the respondent with the company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance.

Per Lord Herschell at 315:

> ... I do not think it is open to any doubt that a person with whom a contract to lend money has entered into cannot obtain specific performance of that contract.

And per Lord Macnaghten at 318:

> That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it.

The emphatic speeches of the law Lords, it was submitted, provide the authority that a contract to lend money (of which the present case is one) cannot be specifically enforced by either party on the generally accepted argument that damages would have provided an adequate remedy.

The rigidity of the principle itself seems to have been eroded – not surprisingly so, for equity, it is often said, varies with the length of the Chancellor's foot. The New Zealand High Court in *Wight v. Haberdan Pty Ltd* [1984] 2 NSWLR 280 found that the decision of the House of Lords was not meant to place a "philosophical objection" to the grant of specific performance in all contracts to lend money under all circumstances but was meant to be only of general application premised on the assumption that damages should provide adequate remedy for any such breach; and whether it would be granted would still have to be judged by the circumstances prevailing in each case.

The Test – Whether A Remedy In Damages Is Adequate To Satisfy The Demand Of Justice

There is a dearth of authorities in our jurisdiction with respect to the criteria that should be adopted by the court to determine the inadequacy of damages considered sufficient to grant specific performance. In the *Wight* case Kearney J found that an agreement made by the defendant Beneficial Financial

Corporation committing itself to provide a mortgage loan to the plaintiff, was legally enforceable. In finding that damages would not provide an adequate remedy to the plaintiff, Kearney J adopted a more holistic approach whereby he tested the adequacy of damages against the demand of justice rather than against a purely monetary consideration. This was how he put it (at 290C of the report):

> In relation to the question of whether damages are an adequate remedy the true rule requires in my view consideration of the circumstances of the particular case in hand. The test is, in my view, whether such a remedy in damages is adequate to satisfy the demand of justice.

He then proceeded to decide that an order of specific performance ought to be granted to compel the defendant to complete its obligation under the agreement and justified his decision as follows:

> In the present instance it is obvious that if the plaintiff is left to pursue common law claims for damages the most complex questions will arise. There will be necessarily difficult questions as to the measure of damages and the remoteness of damage. There will be obviously great delay and expense and at the end of the day the question of what damages could be awarded would, in my view, be extremely difficult, if not virtually impossible, to assess with reasonable accuracy. After all, the rule under which a plaintiff is left to his remedy in damages is founded on an assumption of fact, as was pointed out by Barwick C J in *Bonner*'s case where his Honour says (at 742):
>
> > No doubt the general assumption is that damages for breach of a mere promise to lend money adequately compensates the would be borrower. But, in my opinion, that assumption of fact is not necessarily of universal validity and, again in my opinion, must yield in any case when in fact in the particular circumstances damages would not do justice between the parties. So it seems to me that equity in the more complicated situations of the modern world may well yet find an occasion when justice can only be done in relation to a contract merely to lend money by ordering its specific performance.
>
> Following his Honour's train of thought, the complications involved in the plaintiff being left to pursue a claim for damages in this instance are so monumental and the prospects of an adequate recovery are so remote as to render such a course an unjust imposition upon the plaintiff: see *Vandeventer v. Dale Construction Co* 534 P 2d 183 (1975).

In proposing his 'true rule' Kearney J it would appear, was influenced by the trend set earlier in the House of Lords case of *Beswick v. Beswick* [1967] 2 All ER 1197 where their Lordships were required to decide *inter alia*, whether a payment of annuity promised to a widow by her deceased husband's business partner ought to be enforced by an order of specific performance or merely

by the payment of damages to be assessed in the normal course. In deciding that specific performance ought in the circumstances of that case be granted, Lord Pearce cited with approval the judgment of Kay J in *Hart v. Hart* [1881] 18 Ch D 670, at 685 that:

> ... when an agreement for valuable consideration ... has been partially performed, the court ought to do its utmost to carry out that agreement by a decree of specific performance.

In making the point that equity will intervene to meet the requirement of justice where circumstances justify, Lord Pearce also approved the following statement of Windeyer J in the Australian case of *Bagot's Executor and Trustee Co Ltd v. Coulls'* [1967] 40 ALJR 471:

> The primary obligation of a party to a contract is to perform it, to keep his promise. That is what the law requires of him. If he fails to do so, he incurs a liability to pay damages. That however is the ancillary remedy for his violation of the other party's right to have him carry out his promise. It is, I think, a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages. Rather, using one sentence from the passage of Lord Eskrine's judgment which I have quoted above, the promisee has a legal right to the contract.

For the force of the argument that Kearney J expounded, the *Wight* case may well provide the persuasive authority to be followed in determining whether damages are an adequate remedy in a particular case. The approach allows the court the latitude to be more liberal in applying its conscience of equity rather than to limit itself within a narrow guideline set by precedent that may not be conducive to judicial reasoning.

Circumstances Justifying Specific Performance In The Instant Case

The circumstances justifying the intervention of equity in the instant case could not have been any less deserving than in the *Wight* case.

The plaintiff had already committed himself irrevocably to purchase the property and had signed the sale and purchase agreement and paid the down payment. Time is of the essence and the sum will be forfeited if the balance of the purchase price is not paid in good time. The opportunity to own the land will be lost.

As in the *Wight* case, a complex question with respect to the remoteness and measure of damages will arise if the plaintiff is left to make his claim in damages – given that this may have to encompass the damages he may have to incur on account of his inability to complete the sales and purchase

agreement with the vendor of the property. A difficult if not impossible assessment will also have to be made of any loss he may have to incur with respect to the recovery of the payment already made to Southern Finance to obtain the discharge of charge of the said property.

The contract is at an advanced stage of completion. The property had already been redeemed from Southern Finance by the defendant. The plaintiff had performed his obligations under the agreement to the letter. He had a legitimate expectation that the loan would be made available to him by the defendant in time to settle the balance of the purchase price. Woe betides him if he has to find another financial institution to finance his purchase given that he had been rejected by the defendant.

Damages it is clear, will not be adequate to satisfy the demand of justice of the plaintiff.

The Order

There shall accordingly be an order in terms of the plaintiff's application.